DE 03-030

CONNECTICUT VALLEY ELECTRIC COMPANY
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Application for Approval of Settlements and Related Transactions Related to Implementation of Restructuring in the Area Served by Connecticut Valley Electric Company, Inc.

Order Denying Motion to Amend, Treated as Motion for Rehearing

O R D E R N O. 24,189

July 3, 2003

This proceeding concerns the planned acquisition by Public Service Company of New Hampshire (PSNH) of the franchise and most assets of Connecticut Valley Electric Company (CVEC) – a transaction approved by the New Hampshire Public Utilities Commission (Commission) in this docket by Order No. 24,176 (May 23, 2003). *See also* Order No. 24,184 (June 19, 2003). On June 23, 2003, intervenor Working on Waste submitted a pleading captioned "Motion to Amend Order No. 24,176," which we take up here, and which raises issues separate from the CVEC motion that led to the issuance of our previous clarification. The Governor's Office of Energy and Community Services (ECS), joined by the City of Claremont, New Hampshire Legal Assistance (NHLA), PSNH and the Office of Consumer Advocate (OCA), submitted an objection to the Working on Waste motion on June 30, 2003.

Neither our procedural rules nor any applicable statutes provide for the filing of a motion to "amend" a previously issued order. However, the Working on Waste motion

explicitly invokes Puc 203.04 and RSA 541. The former is simply our rule governing the filing of motions generally. RSA 541, captioned "Rehearings and Appeals in Certain Cases," includes RSA 541:3, which provides for the filing of motions for rehearing. Inasmuch as the filing of a motion for rehearing under RSA 541:3 is a prerequisite to appeal, *see* RSA 541:6, and inasmuch as the Working on Waste motion was submitted within the time period specified in RSA 541:3, we will treat the submission as if it were a rehearing motion.

RSA 541:3 provides that we may grant a request for rehearing if in our opinion "good reason for rehearing is stated in the motion." RSA 541:4 requires that a motion for rehearing "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

In its motion, Working on Waste asks the Commission to include in a revised version of Order No. 24,176 references to certain evidence and arguments, specifically: (1) testimony of Working on Waste witness David Sussman that air emissions from the Wheelabrator incinerator in Claremont would cost Claremont and surrounding communities approximately $6 million per year, (2) Working on Waste's position that the Wheelabrator incinerator should be converted to a recycling center and transfer station, (3) the argument of counsel for PSNH that CVEC's customer base of 10,000 is smaller than the number of customers PSNH typically

acquires in one year through normal load growth, and (4) testimony of witnesses for PSNH, CVEC, OCA, ECS and the City of Claremont to the effect that none of these parties would object to revising the terms of the agreements at issue in this case to provide for the closure of the Wheelabrator incinerator.[1] We decline to do so.

The plain meaning of RSA 541:4, as well as the applicable cases arising under RSA 541, make clear that one must do more in a rehearing motion than simply request a differently worded order. Rather, the movant is obliged to state why the previously entered order is unlawful or unreasonable. *See Appeal of Campaign for Ratepayers Rights,* 145 N.H. 671, 677 (2001); *Appeal of Coffey*, 144 N.H. 531, 533-34 (1999); *Appeal of Osram Sylvania, Inc.*, 142 N.H. 612, 619 (1998); *Appeal of Matthews*, 136 N.H. 221, 226 (1992); *Appeal of Richards*, 134 N.H. 148, 157 (1991).

Working on Waste's arguments with respect to why the referenced evidence or arguments should be specifically reflected in Order No. 24,176 are either missing or unpersuasive. We note at the outset that Working on Waste does not invoke RSA 541-A:35, the provision of the Administrative Procedure Act that covers findings of fact – much less any explanation of why the findings

[1] ECS objects that Working on Waste has inaccurately characterized the position taken by ECS on the record with respect to the possible closure of the Wheelabrator incinerator. We need not address the discrepancy.

actually made in Order No. 24,176 were in some way inadequate. In its opposition to the Working on Waste Motion, ECS characterizes the request of Working on Waste as essentially an "untimely request for findings of fact and rulings of law." We do not make such an assumption given the absence of any argumentation from Working on Waste to that effect. *Cf. Petition of Support Officers I and II*, 147 N.H. 1, 9 (2001) (sustaining appeal based on administrative agency's failure under RSA 541-A:35 to provide "sufficiently detailed findings of fact and rulings of law in its order").

Beyond such questions, Working on Waste does not explain why it was unlawful or unreasonable for Order No. 24,176 not to mention Mr. Sussman's reference to $6 million in emissions-related costs and the fact that some (but not all) of the parties to the proceeding would not object to a closure of the Wheelabrator facility. Accordingly, the lack of such reference in our previous Order was not unlawful or unreasonable and the absence of such references does not constitute good cause for rehearing.

With respect to Working on Waste's proposed conversion of the Wheelabrator facility to another use, and Mr. Bersak's comparison of CVEC's base of 10,000 customers to PSNH's ordinary-year load growth, Working on Waste argues that a particular sentence in Order No. 24,176 is "misleading." Specifically,

Working on Waste refers to the determination in the Order that "one could not assess the environmental impacts of [closing the Wheelabrator waste-to-energy facility] without knowing how the replacement power would be generated and how the waste presently incinerated by Wheelabrator would be disposed of by the municipalities of the Solid Waste Project." Order No. 24,176, slip op. at 44-45. We do not agree that this determination is misleading or somehow compels the Commission to reference either the proposed conversion of the incinerator to a transfer station or Mr. Bersak's comments about PSNH's ability to assimilate the CVEC load into its system. Thus, with respect to these proposed amendments, Working on Waste has not shown good cause for rehearing.

Working on Waste additionally contends that Order No. 24,176 should be amended to reflect that Working on Waste had twice requested that the parties to this proceeding "work on answering two questions." These questions concern (1) the benefits of closing the Wheelabrator facility and (2) the cost of such closure. According to Working on Waste, it made this request in its response to certain data requests and again at the merits hearing before the Commission on May 15, 2003.

In support of its argument that Order No. 24,176 should include a reference to these two requests, Working on Waste invokes certain testimony by Thomas Frantz, the witness who

testified on behalf of the Commission Staff in this proceeding. Mr. Frantz was asked whether the Stipulation of Settlement entered by certain parties in Docket No. DE 00-110 would, if implemented as required by the Agreements at issue in this docket, affect the Commission's 1983 determination with regard to the rates paid by CVEC to Wheelabrator for power. Mr. Frantz replied that he would have to confer with counsel and Working on Waste did not thereafter press the point at hearing. We discern in this exchange no basis for determining that Order No. 24,176 is unlawful or unreasonable in the absence of the amendment sought by Working on Waste, nor has good cause otherwise been shown for such a revision.

Finally, the Working on Waste motion concludes with two requests that we read as asking us to reopen the record to include a new document proffered by Working on Waste and amend Order No. 24,176 to reflect this additional evidence. We decline to do so.

The document in question, appended to the Working on Waste motion, is dated June 19, 2003 and is entitled "Analysis of Air Emissions – Wheelabrator Claremont Company Incinerator – 1987-2002." Whether it should become a part of the record is governed by Puc 202.13, our rule concerning the late-filing of exhibits. The rule specifies that we will authorize the late-filing of exhibits after the close of a hearing upon a finding

that such a filing would enhance our ability to resolve the matter in dispute. The rule further requires us to consider (1) the probative value of the exhibit and (2) whether the opportunity to submit a document impeaching or rebutting the late-filed exhibit without further hearing would adequately protect the parties' right of cross examination pursuant to RSA 541-A:33, IV.

In its pleading, Working on Waste neither references Puc 202.13 nor attempts to explain why it did not adduce the exhibit in question at hearing. In the circumstances, we need not consider the exhibit's probative value or whether it would enhance our ability to resolve any matters in dispute. To admit such an exhibit into the record at this late juncture, without further evidentiary proceedings, would not adequately protect other parties' right of cross examination.

Nor would scheduling an additional hearing for this purpose adequately protect the overall due process rights of the parties in this case whose positions differ from those of Working on Waste. At the outset of this proceeding, we placed the parties on notice that we would not permit procedural delays to affect the substantive outcome of the case, which involves a series of transactions scheduled to close on January 1, 2004. *See* Order No. 24,144 (March 18, 2003), slip op. at 18-19. Absent some showing here as to why Working on Waste was unable to

present the proposed exhibit at hearing, we decline to reopen the record. This determination renders moot the subsidiary request of Working on Waste that we delete the word "speculative" from our description in Order No. 24,176 at pages 45 and 46 of the environmental and health impacts alleged by Working on Waste. The Working on Waste motion makes clear that the requested deletion was made "in deference to the information provided" in the late-filed submission.

In light of our substantive determinations with respect to the Working on Waste motion, it is not necessary for us to take up the procedural issue raised by ECS in its objection. We note, however, that ECS is correct in its contention that Puc 202.18(d) required Working on Waste to serve any RSA 541:3 rehearing motions so as to cause all other parties to receive such motions on the same day they are filed with the Commission. As ECS correctly points out, this is because Puc 204.04(h) requires objections to rehearing motions to be filed within only five days of such motions. To the extent that Working on Waste failed to comply with the applicable service requirements of Puc 202.18(d), it has also failed to meet the filing requirements set forth in Puc 202.07 that would make its submission effective. This in itself would be sufficient grounds for a determination that Working on Waste has waived its rehearing rights, given that the pleading captioned "Motion to Amend" was the only filing made

by Working on Waste during the rehearing period specified in RSA 541:3.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Working on Waste to amend Order No. 24,176, treated as a rehearing motion pursuant to RSA 541:3, is DENIED.

By order of the Public Utilities Commission of New Hampshire this third day of July, 2003.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary